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The New Federalism in Criminal Procedure Revisited

BY DONALD E. WILKES, JR.*

Recognition that the American constitutional system neither requires nor necessarily prefers that state judges conform their interpretation of state Constitutions to the United States Supreme Court's interpretation of the federal Constitution is particularly significant in light of the changing philosophy of the Supreme Court.¹

I. INTRODUCTION

In a 1974 article published in the *Kentucky Law Journal* I examined the growth of a remarkable new trend among some state courts dissatisfied with Burger Court retrenchments in the field of criminal procedure.² These courts, I attempted to demonstrate, had begun manifesting their disapproval of Burger Court decisions undermining the accomplishments of the Warren Court era by extending to criminal suspects state law-based rights coextensive with or broader than the equivalent rights guaranteed under the Federal Constitution as it had been or might be interpreted by the Burger Court. The state cases in which this procedure had been adopted were, I suggested, evasive in the sense that the state courts, by resting their decisions in whole or in part on issues of state law, had deliberately circumvented the Burger Court's power to review state judgments alleged to have expanded a basic right to an excessive degree.³

Under the adequate state ground doctrine, no state judgment, not even one involving a federal question, will be reviewed by the Supreme Court of the United States if the judgment rests on an independent and adequate determination

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¹ Mosk, *The New States' Rights*, 10 CAL. J. LAW ENFORCEMENT 81, 83 (1976).

² Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974) [hereinafter cited as Wilkes I].

³ *Id.* at 436-443.

of state law.⁴ In criminal prosecutions the doctrine traditionally has been applied to prevent review of convictions where the defendant has not complied with a state procedural rule requiring the claim of federal right to be raised in a certain manner or at a certain time.⁵ The doctrine also extends, however, to cases where the prosecution seeks direct review in the Supreme Court of a state judgment in favor of a claim of substantive right and the defendant contends that the judgment is founded on an interpretation of state law.⁶ The adequate state ground doctrine, therefore, prevents Supreme Court review of any state criminal judgment resting on an interpretation of a right arising under state law which at a minimum is coextensive with any corresponding right guaranteed by federal law.

In 1975 I wrote another article on state court evasion of Burger Court decisions which also appeared in this *Journal*.⁷ The second article was devoted largely to an analysis of the evasion cases which had been decided subsequent to preparation of the first article.

Since completion of the second article the Burger Court has continued the methodical demolition of the wall of constitutional protection erected and strengthened by the Warren Court. During its 1975 term, for example, the Court severely restricted the application of the fourth amendment exclusionary rule, vastly enlarging the search and seizure power of police and prosecutorial officials with⁸ or without⁹ a search warrant,

⁴ *Id.* at 427-431. The leading case is *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). Apparently the presence of an adequate state ground divests the Supreme Court of jurisdiction. *Herb v. Pitcairn*, 324 U.S. 117 (1945).

⁵ *Id.* at 429 n. 47.

⁶ *Id.* at 430-31.

⁷ Wilkes, *More on the New Federalism in Criminal Procedure*, 63 Ky. L.J. 873 (1975) [hereinafter cited as Wilkes II].

⁸ See, e.g., *Andresen v. Maryland*, 96 S. Ct. 2737 (1976) (warrant clause of fourth amendment is not violated by issuance of search warrant authorizing seizure of specified items "together with other fruits, instrumentalities, and evidence of crime at this [time] unknown.")

⁹ See, e.g., *United States v. Martinez-Fuerte*, 96 S. Ct. 3074 (1976) (border patrol may, consistent with the fourth amendment, routinely stop automobiles at fixed checkpoints near the Mexican border in an effort to locate illegal aliens despite an absence of either warrant or suspicion that automobile stopped contains illegal aliens); *South Dakota v. Opperman*, 96 S. Ct. 3092 (1976) (fourth amendment permits police, without warrant, to conduct an inventory search of the closed glove compartment of a locked automobile impounded for an ordinary traffic violation); *United States v. San-*

and, in language portending the demise of *Mapp v. Ohio*¹⁰ and *Weeks v. United States*,¹¹ the Court broadened the power of a federal tribunal to admit evidence obtained in violation of the fourth amendment.¹² Other federal rights watered down during the 1975 term included the privilege against self-incrimination,¹³ the right to jury trial,¹⁴ the right to obtain dis-

tana, 96 S. Ct. 2406 (1976) (fourth amendment does not prohibit police intending to enter a private home to make a warrantless arrest from entering the home and effecting the arrest where the arrestee fled from the doorway into the home on seeing approaching police); *United States v. Miller*, 96 S. Ct. 1619 (1976) (since depositor had no fourth amendment interest in bank records, the government prosecutor, without resorting to a court, could subpoena private bank records and then use them in evidence); *United States v. Watson*, 96 S. Ct. 820 (1976) (police may make an arrest without warrant despite opportunity to obtain one; person under arrest may consent to search without awareness of right to refuse consent); *Texas v. White*, 423 U.S. 67 (1975) (where police had probable cause to search defendant's car at the time they arrested him in it, they did not violate fourth amendment when they later searched the automobile at the police station to which it had been taken).

It should be noted that in the *Opperman* and *White* cases the Burger Court reversed state court judgments for having overextended fourth amendment rights.

¹⁰ 367 U.S. 643 (1961).

¹¹ 232 U.S. 383 (1914).

¹² *United States v. Janis*, 96 S. Ct. 3021 (1976) (evidence seized by state law enforcement officials in violation of fourth amendment but "in good faith" is admissible in federal civil action brought by or against the United States). See also *Stone v. Powell*, 96 S. Ct. 3037 (1976) (person convicted of crime in state court may not, in federal habeas corpus proceeding, raise claim that evidence obtained in violation of fourth amendment was used against him at his state trial unless he was denied opportunity to litigate the claim in state court system).

¹³ See, e.g., *Andresen v. Maryland*, 96 S. Ct. 2737 (1976) (privilege against self-incrimination does not prevent seizure and use of incriminating business records from office of defendant); *United States v. Mandujano*, 96 S. Ct. 1768 (1976) (even though a person is a "putative" or "virtual" defendant when called before a grand jury, he is not entitled to be given *Miranda* warnings prior to questioning); *Beckwith v. United States*, 96 S. Ct. 1612 (1976) (*Miranda* warnings need not be given by agents of Internal Revenue Service prior to noncustodial interview with taxpayer being investigated for possible criminal violations); *Fisher v. United States*, 96 S. Ct. 1569 (1976) (privilege against self-incrimination does not prevent government from using summons to require accountant to produce documents relating to preparation of tax returns of a person under investigation for possible criminal or civil tax liability); *Michigan v. Mosley*, 423 U.S. 96 (1975) (police may renew custodial interrogation of suspect who has once exercised his right to remain silent, so long as the suspect's earlier request was "scrupulously honored"). But see *Doyle v. Ohio*, 96 S. Ct. 2240 (1976) (prosecution may not impeach a defendant's trial testimony by introducing evidence of his post-arrest silence).

Mosley was another case in which the Burger Court set aside a state court judgment for extending a federal right—this time the privilege against self-incrimination—beyond the limits thought proper by the Burger Court.

¹⁴ See *Ludwig v. Massachusetts*, 96 S. Ct. 2781 (1976) (right to jury trial is not

closure of exculpatory evidence known by the prosecution,¹⁵ and the protection against being placed in double jeopardy.¹⁶

As a result of the Burger Court's seemingly inexorable relaxation of federal protection for criminal defendants, a number of state courts have continued to expand basic rights on state law grounds, thereby utilizing the adequate state ground doctrine to avoid further review by the Burger Court. Part II of this article will examine the evasion cases decided since March 1975 when I completed the research for my second article.¹⁷ The prospects for continued evasion will be assessed in Part III.

II. RECENT EVASION CASES

The "evasion" cases analyzed below may be divided into those resting on state grounds alone and those resting on both federal and state grounds. Three of the cases grounded on state law alone aimed at avoiding the result reached in prior holdings of the Burger Court. The other three cases resting solely on state grounds and all eight cases resting on federal and nonfederal grounds appear to have been framed evasively in order to eliminate the possibility that the Burger Court might review the case and impose a more restrictive interpretation of the defendant's equivalent federal rights.

violated by state procedure whereunder defendant charged with crime punishable by not more than 5 years imprisonment must first undergo nonjury trial before he can obtain a trial *de novo* with a jury). See also *Ristaino v. Ross*, 96 S. Ct. 1017 (1976) (black defendant charged with crime of violence against white victim is not entitled to question prospective jurors concerning possible racial prejudice).

¹⁵ See *United States v. Agurs*, 96 S. Ct. 2392 (1976) (prosecution was not required to inform defendant, charged with murder, of victim's prior criminal convictions for assault and carrying a deadly weapon).

¹⁶ See *United States v. Dinitz*, 96 S. Ct. 1075 (1976) (a defendant's request for mistrial will not ordinarily prevent further prosecution even though it was necessitated by prosecutorial or judicial error). See also *Ludwig v. Massachusetts*, 96 S. Ct. 2781 (1976) (Massachusetts procedure requiring defendant, charged with crime to which right to jury trial attaches, to undergo nonjury trial before he can obtain *de novo* trial with jury does not subject defendant at second trial to double jeopardy).

¹⁷ In the second article, I defined an evasion case as follows:

An "evasion" case has two characteristics. First, it rests on a state-based right which at a minimum is coextensive with a federal right. Second, the language of the opinion or the circumstances in which it was delivered make it apparent that the state court intended to use the adequate state ground doctrine to avoid Supreme Court review.

Wilkes II, *supra* note 7, at 873 n. 2.

A. Cases Based Solely on State Grounds

In *Schneckloth v. Bustamonte*,¹⁸ the Burger Court set forth its view of the standards to be followed by a federal court in deciding whether a person has consented to a search otherwise violative of the fourth amendment warrant requirement. The Court rejected the petitioner's argument that the standards of waiver applicable to fair trial rights such as confrontation or double jeopardy should be extended to fourth amendment rights.¹⁹ Instead, at least for persons not in custody, the Court held that voluntariness is the test for determining whether an allegedly consensual search is valid and that a finding of voluntariness may be based on the totality of the circumstances even though the consent was given in ignorance of the right to withhold it.²⁰

Two years later, in *State v. Johnson*,²¹ the New Jersey Supreme Court was presented with the same issue. The defendant, indicted on a narcotics charge, had filed a motion in the trial court to suppress evidence obtained by the search. At the hearing on the motion to suppress the state attempted to justify the search on the basis of consent, and the defendant presented evidence to show that no consent to search had been given. The trial judge then granted the motion, in part because he could not conclude that the person who allegedly had consented to the search had done so with knowledge of her right to withhold permission to search. Thereafter, on intermediate appeal, the Superior Court, Appellate Division, reversed the suppression order "on the ground that the trial judge had applied improper standards in passing upon the consent issue."²²

On defendant's appeal, the New Jersey Supreme Court recognized that the intermediate appellate court had been correct in interpreting the *Schneckloth* test and denying a claim that the fourth amendment was violated when the police conducted a search authorized by a person unaware of the right to

¹⁸ 412 U.S. 218 (1973).

¹⁹ *Id.* at 235-246.

²⁰ *Id.* at 231-234. See also *United States v. Watson*, 96 S. Ct. 820 (1976), in which the Burger Court went further and held that knowledge of the right to refuse consent is not a prerequisite for a valid consent search of a person who is in custody.

²¹ 346 A.2d 66 (N.J. 1975).

²² *Id.* at 67.

refuse consent.²³ But this acknowledgment of the Burger Court's authority to interpret the federal Bill of Rights was followed immediately by the observation that "each state has the power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution."²⁴

Clearly, the New Jersey Supreme Court recognized its power to interpret a state-based right more favorably to an accused than the interpretation given to the corresponding federal right. The court also recognized, however, that there were two possible objections to such a procedure in this case. First, the provision of the New Jersey Constitution forbidding unreasonable search and seizure is practically a duplicate of the fourth amendment.²⁵ Second, the state provision had never before "been held to impose higher or different standards than those called for by the Fourth Amendment."²⁶

Nevertheless, the court refused to give the provision of the state constitution on unreasonable search and seizure the interpretation the Burger Court had given the fourth amendment in *Schneckloth*. It did not agree with the Burger Court's holding that a person not in custody may relinquish a right while ignorant of his possession of that right.²⁷ For this reason the court held that consent searches must be judged by waiver standards and that no waiver can be inferred in the absence of a showing that the person consenting was aware of his right to withhold consent:

We conclude that under Art. I, par. 7 of our State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver; *i.e.*, where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.²⁸

The court declined, however, to go even further beyond the Burger Court and rejected the defendant's claim that in a non-

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 68 n. 2.

²⁶ *Id.*

²⁷ *Id.* at 68.

²⁸ *Id.*

custodial situation the police may not conduct a consent search without first advising the person whose consent is sought of his right not to consent.²⁹

Two state supreme courts recently have joined the Supreme Court of Hawaii³⁰ in retreating from one of the Burger Court's dilutions of *Miranda v. Arizona*,³¹ in which the Warren Court held that the fifth amendment privilege against self-incrimination bars the use of statements elicited from a criminal suspect in police custody unless the suspect was first advised of and then agreed to waive his rights. In 1971 in *Harris v. New York*³² the Burger Court eroded the 1966 *Miranda* decision by holding that a voluntary statement obtained in violation of *Miranda* may be introduced by the prosecution as a prior inconsistent statement to impeach the credibility of a defendant who has taken the stand and testified in his own behalf. The opinion of Chief Justice Burger for the Court reflects none of *Miranda's* concern about the dehumanizing consequences of custodial interrogation as it is widely practiced by the police. Moreover, the Court's opinion ignored the vast body of lower court case law to the contrary,³³ misconstrued the relevant precedent of *Walder v. United States*,³⁴ and refused to do more than assume that the standards laid down in *Miranda* would deter police misconduct.³⁵ The Court dismissed as "speculative" the possibility that permitting the use of statements obtained in violation of the fifth amendment would encourage the police to ignore the *Miranda* requirements.³⁶

The two supreme courts that joined the Hawaii Supreme Court in avoiding *Harris* are those in the states of Pennsylvania and California.³⁷

Somewhat ironically, the defendant in *Commonwealth v.*

²⁹ *Id.*

³⁰ See *State v. Santiago*, 492 P.2d 657 (Hawaii 1971).

³¹ 384 U.S. 436 (1966).

³² 401 U.S. 222 (1971).

³³ *Id.* at 231 n. 4 (dissenting opinion of Brennan, J.).

³⁴ 347 U.S. 62 (1954). See Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1211-1218 (1971).

³⁵ *Harris v. New York*, 401 U.S. 222, 225 (1971).

³⁶ *Id.*

³⁷ The Hawaii court's *Santiago* decision is analyzed in Wilkes I, *supra* note 2, at 438.

*Triplett*³⁸ was a police officer. Other policemen complained that they saw him remove television sets from a warehouse, and he was questioned by his superiors at police headquarters. The questioning was preceded by the warning that under the city charter the defendant would be fired if he failed to answer any question put to him. After he had made several incriminating admissions, the defendant was given the *Miranda* warnings and then made additional incriminating statements. The trial court suppressed the initial set of incriminating remarks because they had been obtained by compulsion and the subsequent incriminating remarks on the ground that despite the *Miranda* warning they were the fruit of the first set of admissions. The trial court did, however, under the authority of *Harris*, permit the prosecutor to impeach the defendant's trial testimony by introducing the incriminating statements made at the police station. The defendant was convicted.

Although the Pennsylvania Supreme Court, on appeal, could have avoided reaching the issue of whether to follow *Harris* by the simple expedient of finding the defendant's statements to be involuntary, the court felt "it necessary to decide the issue in terms that will resolve the question in all situations."³⁹ Stated differently, the court had agreed to decide not only whether involuntary statements could be used for impeachment, but also whether statements obtained in violation of *Miranda* could be used to impeach the credibility of a testifying defendant. The court then held:

We are of the opinion that any statement of a defendant declared inadmissible for any reason by a suppression court cannot be used for the purpose of impeaching the credibility of a defendant who elects to testify on his own behalf at trial.⁴⁰

According to the court, this holding was "premised upon the logic" that *Harris* was wrong because it forced a defendant either to forego his right to testify or to suffer the risk of being prejudiced by the use of illegally obtained evidence.⁴¹ The

³⁸ 341 A.2d 62 (Pa. 1975).

³⁹ *Id.* at 64.

⁴⁰ *Id.*

⁴¹ *Id.*

Burger Court had rejected this logic in *Harris*.⁴² In order to justify its departure from *Harris* as a matter of law while at the same time insulating the decision from Burger Court review, the Pennsylvania court stated specifically that the decision was based on the provision of the Pennsylvania constitution guaranteeing the privilege against self-incrimination and the right to due process of law.⁴³

A more recent and arguably even more significant case evading *Harris* on state grounds is *People v. Disbrow*,⁴⁴ in which the California Supreme Court not only systematically attacked the implicit and explicit premises of *Harris*, but also overruled one of its own previous decisions which had followed *Harris*.

At his trial for two homicides the defendant in *Disbrow* testified that he was innocent because he had acted in self-defense. Over objection, but pursuant to *Harris*, the prosecution was permitted to attack the defendant's credibility by introducing prior inconsistent statements the defendant had made to a police detective. The incriminating statements concededly had been obtained in violation of *Miranda* because the detective conducting the interrogation, after advising the defendant of his *Miranda* rights and hearing the defendant announce his wish to remain silent and consult an attorney, had continued the interrogation and persuaded the defendant to confess by promising that his statements could not be used against him.⁴⁵ Thereafter the defendant was convicted.

The defendant appealed to the California Supreme Court on the grounds that the impeaching statements had been improperly admitted. Despite its prior decision adhering to *Harris* in *People v. Nudd*,⁴⁶ the court agreed to reconsider the issue of the admissibility for impeachment of evidence obtained in violation of *Miranda*. The court began its reconsideration by examining the circumstances under which statements that are inadmissible as substantive evidence because they have been

⁴² 401 U.S. at 225.

⁴³ 341 A.2d at 64.

⁴⁴ 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

⁴⁵ Apparently the prosecution conceded that *Miranda* had been violated because the detective surreptitiously had recorded the interrogation session. *Id.* at 273, 127 Cal. Rptr. at 361.

⁴⁶ 524 P.2d 844, 115 Cal. Rptr. 372 (1974).

illegally obtained can nevertheless be used for impeachment. It reviewed prior United States Supreme Court cases dealing with the impeachment use of evidence otherwise inadmissible under the fourth amendment exclusionary rule and concluded—quite correctly⁴⁷—that the Burger Court in *Harris* had misconstrued *Walder*, the leading case on the impeachment use of illegally obtained physical evidence.⁴⁸ On the basis of this analysis, the court, unlike the Burger Court, was “not convinced that *Walder* supports the proposition that statements elicited in violation of *Miranda* may generally be used to impeach.”⁴⁹ A similar conclusion had been reached by Justice Brennan in his dissenting opinion in *Harris*.⁵⁰

In addition to determining that the decision in *Harris* was not supported by the case law relied on by the Burger Court, the California Supreme Court expressed concern that continued reliance on the “*Harris-Nudd* rule would resurrect the remains of the earlier voluntariness test.”⁵¹ *Miranda* had, after all, been based in part on the difficulties involved in applying the old voluntariness test under which involuntary confessions were excluded as violative of due process of law. Since under *Harris*, only voluntary statements obtained in violation of *Miranda* could be used for impeachment, continued application of *Harris* would result in the courts once again having to resolve the intractable issue of voluntariness in every case in which the prosecution sought to impeach the defendant’s credibility with a statement procured in violation of *Miranda* and

⁴⁷ See note 34 *supra*.

⁴⁸ 545 P.2d at 275-277, 127 Cal. Rptr. at 363-365. In examining *Walder* and other prior federal cases, including *Agnello v. United States*, 269 U.S. 20 (1925), the California court was careful to observe:

Of course, we do not presume to interpret the above-discussed federal decisions in a manner contrary to that established by the United States Supreme Court as a matter of federal law. We discuss these cases only in order to determine whether under state law they are persuasive authority for interpreting California cases . . . to furnish justification for an impeachment exception to the self-incrimination clause of article I, section 15, of the California Constitution. In short, our decision herein is not based on a different reading of *Agnello-Walder*, but rather a different view of the parameters of the independent state self-incrimination clause.

545 P.2d at 277 n. 9, 127 Cal. Rptr. at 365 n. 9.

⁴⁹ 545 P.2d at 277, 127 Cal. Rptr. at 365.

⁵⁰ 401 U.S. at 227-229 (Brennan, J., dissenting).

⁵¹ 545 P.2d at 278, 127 Cal. Rptr. at 366.

claimed by the defendant to be involuntary.⁵² Thus *Harris*, the court felt, tended to lead courts back into "precisely the evidentiary thicket *Miranda* was designed to avoid."⁵³

Having decided that the *Harris* rule was consistent with neither prior federal case law nor the purpose of the *Miranda* case, the California court turned to a consideration which it believed to be the "principal objection"⁵⁴ to *Harris*. Although Chief Justice Burger's opinion in *Harris* had not dealt with the question of whether a jury is capable of distinguishing between substantive evidence and impeachment evidence, the California Supreme Court simply did not believe that it was possible for a jury advised of an inculpatory statement secured in violation of the privilege against self-incrimination to limit its consideration of the statement to the issue of whether it reflected on the truthfulness of the defendant's testimony. The court observed:

[There is] considerable potential that a jury, even with the benefit of a limiting instruction, will view prior inculpatory statements as substantive evidence of guilt rather than as merely reflecting on the declarant's veracity. The theory of a limiting instruction loses meaning in this context. It is to be recalled that we are here dealing with extrajudicial *inculpatory* admissions. To instruct a jury that they are not to consider expressions of complicity in the charged crime as evidence that the speaker in fact committed the charged crime, but only for the purpose of demonstrating that he was probably lying when he denied committing the charged crime, would be to require, in the words of Learned Hand, "a mental gymnastic which is beyond, not only [the jury's] power, but anybody's else."⁵⁵

The California Supreme Court saw two other flaws in *Harris*. The Burger Court in *Harris* had described as "speculative" the possibility that the police might be encouraged to violate the *Miranda* rules if they knew that admissions of guilt obtained in violation of *Miranda* would be admissible for impeachment. The California Supreme Court, based on the facts of the case before it, disagreed:

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 279, 127 Cal. Rptr. at 367.

⁵⁵ *Id.* (citation omitted).

[T]o permit admissibility leaves little or no incentive for police to comply with *Miranda*'s requirements. If an officer may falsify the warning concerning the admissibility of statements, as in the case at bar, other warnings may be similarly inverted or retracted. The police, for example, may inform an accused that he has no right to remain silent and no right to counsel. In a case of notoriety with little independent evidence there may be irresistible pressures on law enforcement personnel to secure a confession. If it is known that statements elicited in violation of *Miranda* may nevertheless be introduced at some point in the trial there would exist no sanction whatever against the use of overbearing interrogatory techniques, at least until the practices approached traditional levels of coercion.⁵⁶

The California court also thought that admitting illegally obtained evidence, even if only for impeachment, would be contrary to "a significant rationale of the exclusionary rule itself" by infringing on judicial integrity.⁵⁷ Both of these objections to the majority opinion in *Harris* had been raised by Justice Brennan when he dissented in that case.⁵⁸

Having thus rejected the premises supporting *Harris*, the California Supreme Court reversed the judgment of conviction and arrived at a result contrary to *Harris*. The possibility that the Burger Court might review the decision unfavorably and thereby reinstate the rule of *Harris* in California was effectively eliminated by resting the refusal to follow *Harris* on state constitutional grounds. Perhaps out of concern that the Burger Court, which has no love for *Miranda*, might nevertheless set aside the California judgment by overruling *Miranda* itself, the court in addition held the *Miranda* decision to be required under the California Constitution. The court's holding was:

We . . . hold that the privilege against self-incrimination of article I, section 15, of the California Constitution precludes use by the prosecution of any extrajudicial

⁵⁶ *Id.*

⁵⁷ *Id.* The Burger Court, of course, has indicated that it recognizes no imperative of judicial integrity compelling it to exclude evidence obtained in violation of either the fourth amendment, *United States v. Calandra*, 414 U.S. 338 (1974), or the fifth amendment privilege against self-incrimination, *Michigan v. Tucker*, 417 U.S. 433 (1974).

⁵⁸ 401 U.S. at 231-232 (Brennan, J., dissenting).

statement by the defendant, whether inculpatory or exculpatory, either as affirmative evidence or for the purposes of impeachment, obtained during custodial interrogation in violation of the standards declared in *Miranda* and its California progeny. Accordingly, we overrule *Nudd* and declare that *Harris* is not persuasive authority in any state prosecution in California.⁵⁹

The decisions in *Johnson*, *Triplett*, and *Disbrow* aimed at evading past Burger Court holdings narrowly interpreted the scope of federally protected rights. In three other recent evasion cases also resting solely on issues of state law the emphasis was on avoiding possible future decisions of the Burger Court which might further reflect a narrow view of rights guaranteed under the Federal Constitution. The first of these involved the privilege against self-incrimination. The other two involved the right to counsel and the protection against cruel and unusual punishment.

In *State v. Deatore*⁶⁰ the defendant was convicted of robbery, and the Appellate Division of the New Jersey Superior Court reversed because the trial judge had permitted the prosecution, over objection, to cross-examine the defendant by asking him about his failure to speak or offer exculpatory evidence at the time of his arrest. Although the evidence had been admitted not as substantive proof of guilt but only for impeachment as a prior inconsistent statement, the Appellate Division reasoned that admitting evidence of silence at or near the time of arrest violated the privilege against self-incrimination under the fifth amendment because it penalized a defendant who merely invoked his rights.⁶¹ The prosecution appealed to the New Jersey Supreme Court.

When the state's appeal reached the New Jersey Supreme Court the issue of the admissibility under the fifth amendment of post-arrest statements to impeach the credibility of a criminal suspect who testifies at trial was also pending in the Burger Court.⁶² Resolution of the appeal was therefore delayed while

⁵⁹ 545 P.2d at 280, 127 Cal. Rptr. at 368.

⁶⁰ 358 A.2d 163 (N.J. 1976). See also *People v. Moore*, 223 N.W.2d 302 (Mich. App. 1974), cert. denied, 423 U.S. 878 (1975); *Commonwealth v. Woods*, 312 A.2d 357 (Pa. 1973); *People v. Bobo*, 212 N.W.2d 190 (Mich. 1973).

⁶¹ 358 A.2d at 168.

⁶² *United States v. Hale*, cert. granted, 419 U.S. 1045 (1974).

the New Jersey court waited to see how the Burger Court would decide the issue. On June 23, 1975, the Burger Court delivered its judgment, holding that it was unnecessary to reach the fifth amendment issue because the use of post-arrest statements for impeachment in a federal court was prohibited under the Supreme Court's supervisory power to control federal criminal proceedings.⁶³

After reargument and the filing of supplemental briefs on the applicability of the Burger Court decision, the New Jersey Supreme Court held that the use of post-arrest silence to impeach the credibility of a testifying defendant is impermissible because it penalizes an accused for exercising his fundamental right to silence:

[A] defendant is under no obligation to volunteer to the authorities at the first opportunity the exculpatory story he later tells at his trial and cannot be penalized directly or indirectly if he does not. . . . The privilege of silence is substantially eroded and reliance upon it unjustifiably penalized [when the prosecution endeavors to impeach a defendant's exculpatory testimony through cross examination concerning the defendant's refusal to talk at the time of his arrest].⁶⁴

The decision to prevent the prosecution from assailing the veracity of a defendant by introducing proof that the defendant's trial testimony was inconsistent with his post-arrest silence was reached "as a matter of state law and policy, as to which we may impose standards more strict than required by the Federal Constitution, which standards will control regardless of the final outcome of the question in the federal sphere."⁶⁵ By thus resting its decision on the New Jersey common law privilege against self-incrimination rather than the fifth amendment,⁶⁶ the court immunized its decision from review by the Burger Court in the event, which may then have seemed likely,⁶⁷ that the Burger Court should uphold this impeachment

⁶³ *United States v. Hale*, 422 U.S. 171 (1975).

⁶⁴ 358 A.2d at 172.

⁶⁵ *Id.* at 170.

⁶⁶ New Jersey is the only state in which there is no provision of the state constitution guaranteeing the privilege against self-incrimination. The privilege exists in the state by virtue of the common law, as confirmed by a statute. *See* 358 A.2d at 171.

⁶⁷ *See, e.g., Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S.

technique over fifth amendment objections.⁶⁸ Basing the decision on the state privilege against self-incrimination also allowed the court to ignore the prosecution's interpretation of the *Harris* case, which the court thought inapposite anyway.⁶⁹

In *Commonwealth v. Romberger*⁷⁰ the Pennsylvania Supreme Court reversed the defendant's murder conviction because the confession introduced at trial had been extracted by police officers who, in violation of *Miranda*, failed to inform the indigent defendant of his right to have counsel furnished free of charge during the custodial interrogation. Although the interrogation had occurred prior to the *Miranda* decision, the *Miranda* rules were held applicable under *Johnson v. New Jersey*⁷¹ because the trial had begun after *Miranda* was decided. Thereafter the Burger Court granted the Commonwealth's certiorari petition, vacated the judgment, and remanded for reconsideration⁷² in light of *Michigan v. Tucker*.⁷³ In that case, where the interrogation also had occurred prior to the *Miranda* decision, the Burger Court upheld the admissibility of the testimony of a witness whose identity was discovered by the police as a result of an interrogation session which violated *Miranda* because the defendant was not advised of his right to free counsel.

On remand, the Pennsylvania Supreme Court reinstated its judgment of reversal.⁷⁴ *Tucker* was distinguished on the ground that, unlike the present case, it had not involved the admissibility of an accused's statements obtained in violation of *Miranda*.⁷⁵ In order to insure that its judgment was not dis-

222 (1971). Subsequently, in 1976, the Burger Court held the impeachment technique to be violative of the Federal Constitution. See *Doyle v. Ohio*, 96 S. Ct. 2240 (1976).

⁶⁸ When the New Jersey Supreme Court decided *Deatore* it knew that the Burger Court had agreed to hear two state cases in which the issue of the use of post-arrest silence for impeachment was again raised. The cases were *Doyle v. Ohio*, cert. granted, 423 U.S. 823 (1975), and *Wood v. Ohio*, cert. granted, 423 U.S. 823 (1975). See 358 A.2d at 168 n. 5.

⁶⁹ The court said: "We may add that we do not interpret *Harris v. New York* . . . to indicate a different result in the situation before us, but, even if it should, we choose to impose a stricter standard as a matter of state law." 358 A.2d at 172.

⁷⁰ 312 A.2d 353 (Pa. 1973).

⁷¹ 384 U.S. 719 (1966).

⁷² 417 U.S. 964 (1974).

⁷³ 417 U.S. 433 (1974).

⁷⁴ *Commonwealth v. Romberger*, 347 A.2d 460 (Pa. 1975).

⁷⁵ *Id.* at 461.

turbed again, however, the court further held that the confession below ought to have been excluded because the defendant under the Pennsylvania Constitution had a right to be advised that he was entitled to the presence of appointed counsel before he was interrogated.⁷⁶ Apparently this part of the decision was placed on state constitutional grounds because, as the Pennsylvania court recognized, in some of the *dicta* in *Tucker* the Burger Court had taken a restrictive view of the right to counsel prior to preliminary hearing.⁷⁷

In *Romberger* the Pennsylvania court based its judgment partly on state law grounds to avoid unfavorable review if the Burger Court decided to restrict the pretrial right to counsel. In *Commonwealth v. O'Neal*,⁷⁸ the Massachusetts Supreme Judicial Court rested its holding on a state ground to assure that its view of the validity of capital punishment would not be disturbed by a Burger Court decision rejecting a claim that the death penalty constitutes a cruel and unusual punishment in violation of the eighth amendment. In *O'Neal* the court held that a Massachusetts statute requiring imposition of a sentence of death on anyone convicted of rape-murder was unconstitutional under the Massachusetts Declaration of Rights.⁷⁹ At the time of the decision in *O'Neal* the Burger Court, as the Massachusetts court knew,⁸⁰ was awaiting reargument in a North Carolina case raising a virtually identical issue under federal constitutional law.⁸¹

⁷⁶ *Id.* at 464.

⁷⁷ *Id.* at 463-464.

⁷⁸ 339 N.E.2d 676 (Mass. 1975). *See also* *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1 (Ill. 1975).

⁷⁹ Two justices concluded that the rape-murder statute violated both the provision of the Declaration of Rights guaranteeing due process of law and the provision prohibiting cruel or unusual punishment. Two other justices concluded that the statute violated only the former provision. A fifth justice concurred in the result by a process of statutory construction. Two justices dissented.

⁸⁰ *See* 339 N.E.2d at 690 (concurring opinion of Tauro, C. J.); 339 N.E.2d at 699 (dissenting opinion of Reardon, J.).

⁸¹ The North Carolina case was *Fowler v. North Carolina*, 203 S.E.2d 803, *cert. granted*, 419 U.S. 963 (1974). Subsequently, in 1976, the Burger Court held unconstitutional state statutes imposing a mandatory death penalty for the crime of murder. *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976); *Roberts v. Louisiana*, 96 S. Ct. 3001 (1976). The Court upheld the constitutionality of statutes granting juries discretion whether to impose the death penalty for murder, however. *Gregg v. Georgia*, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 96 S. Ct. 2960 (1976); *Jurek v. Texas*, 96 S. Ct. 2950 (1976).

B. Cases Based on Federal and State Grounds

In the 5 years since the 1970 term ended, the Burger Court has decided over a score of cases involving search and seizure issues but found tangible evidence to have been obtained in violation of the fourth amendment only three times.⁸² As a result, the California Supreme Court, which has not hesitated to express its disagreement with the Burger Court's diminution of fourth amendment protections on a number of occasions, has tended over the past several years to rest an increasing number of its search and seizure decisions on grounds of federal and state law⁸³ or of state law alone.⁸⁴ Three of the most recent decisions of the California court grounded on issues of both federal and state law to avoid possible future Burger Court decisions further diluting the fourth amendment are *People v. Ramey*,⁸⁵ *Wimberly v. Superior Court*,⁸⁶ and *People v. Bracamonte*.⁸⁷ In *Ramey* the court held that both the fourth amendment and the equivalent provision of the state constitution prohibited warrantless arrests within a private home in the absence of exigent circumstances. From the circumstances in which the case was decided it appears that the California court grounded its decision on both federal and state law out of concern that the Burger Court eventually would uphold the validity of such arrests under the fourth amendment.⁸⁸ In *Wimberly* the court held that police officers had violated the fourth amendment and the parallel provision of the California constitution when they stopped an automobile on the highway with

⁸² *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almedia-Sanchez v. United States*, 413 U.S. 266 (1973). The Court excluded oral admissions of guilt on the grounds that they had been obtained in violation of the fourth amendment in *Brown v. Illinois*, 422 U.S. 590 (1975).

⁸³ See, e.g., *People v. Scott*, 546 P.2d 327, 128 Cal. Rptr. 39 (1976); *People v. Krivda*, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

⁸⁴ See, e.g., *People v. Maher*, 550 P.2d 1044, 130 Cal. Rptr. 508 (1976); *People v. Longwill*, 538 P.2d 753, 123 Cal. Rptr. 297 (1975); *People v. Norman*, 538 P.2d 237, 123 Cal. Rptr. 109 (1975). But see *People v. Harris*, 540 P.2d 632, 124 Cal. Rptr. 536 (1975).

⁸⁵ 545 P.2d 1333, 127 Cal. Rptr. 629 (1976).

⁸⁶ 547 P.2d 417, 128 Cal. Rptr. 641 (1976).

⁸⁷ 540 P.2d 624, 124 Cal. Rptr. 538 (1975).

⁸⁸ At the time the *Ramey* decision was handed down, the Burger Court was awaiting oral argument in a case raising a closely related issue. *United States v. Santana*, cert. granted, 423 U.S. 890 (1975).

probable cause to search its interior and proceeded to search the trunk also. In light of prior Burger Court decisions vesting the police with the power to conduct warrantless searches of just about anything with four wheels and an engine,⁸⁹ however, it seems clear that the decision was based on federal and state grounds because of the California court's concern that the Burger Court might take a different view of the fourth amendment.

Bracamonte is a much more noteworthy case. There the defendant, lawfully arrested and reasonably suspected of having swallowed illegal drugs to conceal them, was taken to a hospital where physicians, acting pursuant to the directives of the arresting officers, forced her despite violent resistance to swallow an emetic which caused her to regurgitate the contraband.

The California court could have held the drugs to be inadmissible without resorting to state law by relying on *Rochin v. California*,⁹⁰ in which the Vinson Court had held that a forced stomach-pumping of another drug-swallowing criminal suspect had violated a "shock the conscience" test and was thus impermissible under the due process clause of the fourteenth amendment. The decisions of the Burger Court expanding the power of the police to search and seize do not purport to cast doubt on the wisdom of *Rochin*. Some Burger Court decisions weakening fourth amendment protections have even implicitly approved *Rochin*.⁹¹ Nevertheless, the California court held the search and seizure in *Bracamonte* to have been illegal under both the federal and California constitutional provisions guaranteeing due process of law. *Bracamonte* is therefore a telling commentary on the California Supreme Court's opinion of the Burger Court's approach to search and seizure problems. It demonstrates that the California court is unwilling to assume that the Burger Court may not overrule *Rochin* and construe the Federal Constitution to permit the admission into evidence of objects seized by means of a search and seizure which shocks the conscience by its physical brutality.

⁸⁹ See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

⁹⁰ 342 U.S. 165 (1952).

⁹¹ See, e.g., *United States v. Robinson*, 414 U.S. 218, 236 (1973).

Two other recent evasion cases involving search and seizure issues deserve brief mention. In *Tamez v. State*⁹² the Texas Court of Criminal Appeals held violative of the fourth amendment and the corresponding provision of the state constitution a condition of probation requiring the probationer, whenever requested by a police officer, to consent to a search of his person, residence, and vehicle at any time of the day or night. The decision probably was grounded on both federal and state law because of past Burger Court decisions enlarging the consent exception to the fourth amendment requirement of a search warrant.⁹³ In *State v. Mora*⁹⁴ the Louisiana Supreme Court held unreasonable a search of a student's wallet conducted by a public school principal. Since the language of the court's opinion did not make plain whether the decision was based on federal or state grounds, the Burger Court granted the state's petition for certiorari, vacated, and remanded for consideration of "whether [the] judgment is based upon federal or state constitutional grounds, or both."⁹⁵ The Louisiana court thereupon issued a second opinion stating that its prior decision was based on state law insofar as it found that the school principal was an agent of the state, on federal and state law insofar as it held that the search and seizure was unreasonable, and on federal law alone insofar as it held that the illegally obtained evidence had to be suppressed.⁹⁶ Over the protests of three dissenting judges who contended that only federal law was applicable, the state court then reaffirmed its prior judgment.

The final three recent evasion cases based on both federal and state grounds dealt with the privilege against self-incrimination and the right to counsel. The Appellate Court of Illinois in *People v. Wright*⁹⁷ held that both the fifth amendment privilege against self-incrimination and the provision of the Illinois Constitution guaranteeing the privilege barred the state from impeaching the credibility of a testifying defendant

⁹² 534 S.W.2d 686 (Tex. Crim. App. 1976).

⁹³ See, e.g., *United States v. Matlock*, 415 U.S. 164 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁹⁴ 307 So.2d 317 (La. 1975).

⁹⁵ *Louisiana v. Mora*, 423 U.S. 809 (1975).

⁹⁶ *State v. Mora*, 330 So.2d 900 (La. 1976).

⁹⁷ 336 N.E.2d 18 (Ill. App. 1975).

by offering proof of post-arrest silence. Like the New Jersey decision in *Deatore*,⁹⁸ the judgment in *Wright* appears to have been grounded on state law to guard against the possibility that the Burger Court might subsequently hold that the use of this impeachment technique is not repugnant to the federal privilege against self-incrimination.

In the other case involving the privilege against self-incrimination, *State v. Gallagher*,⁹⁹ the Supreme Court of Ohio held inadmissible a confession obtained by the accused's parole officer where the parole officer had not first advised the accused of his *Miranda* rights. The language in the court's opinion did not specify whether the decision rested on the fifth amendment, the privilege against self-incrimination guaranteed by the Ohio Constitution, or both. The Burger Court granted the state's petition for certiorari on the issue of whether *Miranda* should be extended to include custodial interrogation conducted by parole officers.¹⁰⁰ During oral argument, counsel for the State, replying to a question from Justice Brennan, acknowledged that the Ohio court had relied on both federal and state law, whereupon a lengthy discussion took place concerning whether the adequate state ground doctrine precluded further review in the Supreme Court.¹⁰¹ Thereafter the Burger Court vacated the judgment and remanded the case for consideration of whether it rested on federal or state grounds, or both,¹⁰² and the Ohio Supreme Court restored its prior judgment, stating:

[I]n reaching our initial decision herein we relied upon the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution. Although it is our view that we should reach the same conclusion under the Fourteenth Amendment, we were (and we are) in any event independently constrained to the result we reached by the Ohio Constitution.¹⁰³

Clearly, *Gallagher* was decided evasively in order to avoid the

⁹⁸ 358 A.2d 163 (N.J. 1976). See notes 60-69 *supra* and accompanying text.

⁹⁹ 313 N.E.2d 396 (Ohio 1974).

¹⁰⁰ *Ohio v. Gallagher, cert. granted*, 420 U.S. 1003 (1975).

¹⁰¹ 18 CRIM. L. REP. 4121-4122 (1976).

¹⁰² *Ohio v. Gallagher*, 96 S. Ct. 1438 (1976).

¹⁰³ *State v. Gallagher*, 348 N.E.2d 336, 338 (Ohio 1976).

possibility of future Burger Court decisions weakening *Miranda*.

Finally, in *Pirtle v. State*,¹⁰⁴ the Indiana Supreme Court interpreted the right to counsel clause of the sixth amendment and the corresponding provision of the Indiana constitution to guarantee a person in police custody the right, absent waiver, to the assistance of counsel prior to consenting to a search. Like the *Romberger*¹⁰⁵ decision of the Pennsylvania Supreme Court, *Pirtle* appears to have been based on state law out of concern that the Burger Court might narrow the federal right to counsel prior to trial.

III. THE PROSPECTS FOR CONTINUED EVASION

Whether state courts will continue to use state law to vindicate the rights of persons suspected of crime depends to a great extent on future actions of the Burger Court. Unquestionably a shift away from the Court's law and order approach might reduce fears that any state judgment upholding a right on federal grounds alone is in jeopardy of being set aside by the Burger Court. State courts might then be persuaded to abandon their use of the adequate state ground doctrine to protect their judgments from review. In light of its present composition, however, it seems unlikely that the Burger Court will depart from its tradition of construing federal rights narrowly.

The Court's fidelity to the adequate state ground doctrine will also affect the future of state court evasion. The Court knows that state courts are declining to adhere to its decisions while simultaneously using the doctrine to preclude the possibility of unfavorable review.¹⁰⁶ There are even indications that the matter has become a private joke among the nine justices of the high court.¹⁰⁷ Will the Court therefore attempt to curb

¹⁰⁴ 323 N.E.2d 634 (Ind. 1975).

¹⁰⁵ 312 A.2d 353 (Pa. 1973). See notes 70-77 *supra* and accompanying text.

¹⁰⁶ See *United States v. Miller*, 96 S. Ct. 1619, 1626 (1976) (dissenting opinion of Brennan, J.); *Texas v. White*, 423 U.S. 67, 69 (1975) (dissenting opinion of Marshall, J.); *Oregon v. Hass*, 420 U.S. 714 (1975).

¹⁰⁷ During oral argument in *Michigan v. Mosley*, 423 U.S. 96 (1975), this colloquy took place between one of the justices—probably Justice Brennan—and the attorney for the defendant:

QUESTION: Why can't you argue all of this as being contrary to the law and the constitution of the State of Michigan?

the evasion by altering the adequate state ground rule? In my second article I suggested that the decision in *Air Pollution Variance Board v. Western Alfalfa Corp.*¹⁰⁸ might portend a modification of the rule.¹⁰⁹ In *Western Alfalfa* the Court reviewed a state civil judgment holding that a pollution inspector's search violated a corporation's right to privacy under the fourth amendment, as well as its right to due process of law. It was unclear whether the right to due process of law upheld by the state court was the right guaranteed under the fourteenth amendment, the right guaranteed under state law, or both. Instead of returning the case to the state court for a determination of whether it rested on a state ground, as would have been proper,¹¹⁰ the Burger Court reversed the judgment on the fourth amendment issue and remanded the case for a determination of whether the due process issue rested on federal or state grounds or both. I now doubt that *Western Alfalfa* heralded a change in the adequate state ground doctrine with respect to evasion cases resting on federal and nonfederal grounds. The Court's refusal to reach the merits in *Louisiana v. Mora*¹¹¹ and *Ohio v. Gallagher*¹¹² because it was unsure whether the state court's decision was based on federal or state law indicates that the Court probably will not tinker with the rule, even when its operation prevents the Court from reviewing a judgment alleged to have unduly expanded a federal right.

MR. ZIEMBA: I can because we have the same provision in the Michigan Constitution of 1963 as we have in the Fifth Amendment of the Federal Constitution, certainly.

QUESTION: Well, you argued the whole thing before.

MR. ZIEMBA: In the Court of Appeals?

QUESTION: Yes.

MR. ZIEMBA: I really did not touch upon—I predicated my entire argument on the Federal Constitution, I must admit that. I did not mention the equivalent provision of the Michigan Constitution of 1963, although I could have. And may I assure this Court that at every opportunity in the future I shall. [Laughter.]

United States v. Miller, 96 S. Ct. 1619, 1629 n. 4 (1976) (dissenting opinion of Brennan, J.).

¹⁰⁸ 416 U.S. 861 (1974).

¹⁰⁹ See Wilkes II, *supra* note 7, at 893-894.

¹¹⁰ See California v. Krivda, 409 U.S. 33 (1972). See also Wilkes I, *supra* note 2, at 441-442.

¹¹¹ 423 U.S. 809 (1975).

¹¹² 96 S. Ct. 1438 (1976).

I am skeptical, therefore, that the Burger Court will attempt to interfere with state court judgments extending to persons charged with crime state-based rights coextensive with or greater than the rights guaranteed by federal law. But this does not mean that state courts may assume that they will be free of interference from other sources in the event that they elect to construe rights arising under state law broadly. An evasive judgment resting on a construction of a right originating in a state statute or under the common law may be nullified by a subsequent enactment of the state legislature. Although no instances have been found in which this has actually happened,¹¹³ it remains true that an evasive decision grounded on state non-constitutional law is subject to being negated whenever there are enough votes in the legislature to repeal or modify the statute or rule of common law relied on by the state court. Moreover, an evasion case resting on state constitutional grounds, while not vulnerable to statutory abrogation, may be nullified if the decision is sufficiently unpopular to result in a state constitutional amendment. One of the earliest and most important of all evasion cases, *People v. Anderson*,¹¹⁴ which struck down capital punishment as a cruel and unusual punishment in violation of the California state constitution, was overridden just 9 months later when California voters amended the state constitution to legalize the death penalty.¹¹⁵ There appear to be no other instances in which an evasion decision was nullified by subsequent amendment of the state constitution, although efforts presently are underway in Massachusetts to amend the state constitution to permit the death penalty, thereby overruling the *O'Neal* case.¹¹⁶

The prospects for continued evasion, therefore, appear to be bright. While it might be possible for the Burger Court to curtail some of the evasion by altering the adequate state ground doctrine, the Court does not appear likely to do so. Furthermore, while evasion cases are vulnerable to subsequent

¹¹³ There are, however, instances in which state legislatures have acted to protect rights undermined by Burger Court decisions. See, e.g., MASS. ANN. LAWS, ch. 276, § 1 (Supp. 1974).

¹¹⁴ 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

¹¹⁵ CAL. CONST. art. 1, § 27.

¹¹⁶ See Boston Sunday Globe, June 6, 1976, at 46, col. 1.

statutory enactment or constitutional amendment, at present this threat to continued evasion remains more theoretical than actual.

IV. CONCLUSION

In response to Burger Court decisions cutting back on the achievements of the Warren Court and setting aside state judgments favorably interpreting a federal right, state courts in the early 1970's began evading the Burger Court by taking a more generous view of the rights of criminal suspects on the basis of state law. An examination of state cases recently decided discloses that there has been no lessening of this tendency to avoid the possibility of Burger Court review by resting the decision in favor of the rights of the accused wholly or partly on grounds of state law.

I therefore believe that this nation has moved into "a new period of federalism in criminal procedure in which the state-based rights of criminal defendants will assume increasing significance as federal-based rights play an ever-diminishing role."¹¹⁷ This era will endure until either of two developments occurs. The nation's highest Court may regain the will to interpose its authority under the Federal Constitution between the individual charged with crime and the authorities of government arrayed against him, in which event state courts concerned with maintaining a healthy balance between the individual and the state will no longer feel it necessary to avoid Supreme Court review. On the other hand, the state courts may abandon their more expansive interpretations of basic rights and submit to Burger Court dilutions of those rights, in which event the flow of evasion cases will cease. Hopefully the state courts which have evaded the Burger Court will never adopt the Burger Court's unduly narrow view of the rights to which Americans charged with crime are entitled. If they do not, the state court evasion examined in this and the prior two articles will continue until once again the Supreme Court of the United States is a leader rather than a laggard in defining the scope of the civil liberties possessed by persons brought into court pursuant to a criminal charge.

¹¹⁷ Wilkes I, *supra* note 2, at 426.